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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

RAYMOND FELDMAN, Plaintiff and Appellant, v. BAC HOME LOANS SERVICING, LP et al., Defendants and Respondents.	B240285 (Los Angeles County Super. Ct. No. SC109666)

APPEAL from a judgment of the Superior Court of Los Angeles County. Jacqueline A. Connor, Judge; Cesar C. Sarmiento, Judge. Affirmed.

Raymond Feldman, in pro. per., for Plaintiff and Appellant.

Bryan Cave, Glenn J. Plattner and Christina Rea for Defendants and Respondents.

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Plaintiff and appellant Raymond Feldman defaulted on a $1 million loan and filed an action against defendants and respondents BAC Home Loan Servicing, LP (BAC), ReconTrust Company, N.A. (ReconTrust), Bank of New York Mellon fka The Bank of New York as Trustee for the Certificate Holders CWMBS, Inc., CHL Mortgage Pass-Through Trust 2005-HYB 8 Mortgage Pass-Through Certificates, Series 2005-HYB8 (BNY) and Mortgage Electronic Registration Systems, Inc. (MERS) (sometimes collectively defendants) in an effort to invalidate the foreclosure proceedings. After giving appellant leave to amend, the trial court sustained a demurrer to his first amended complaint without leave to amend, finding he failed to allege that defendants lacked authority or standing to foreclose.

We affirm. Preliminarily, the trial court properly rejected appellant's effort to disqualify it and properly exercised its discretion in granting a motion to quash a deposition notice. The trial court also properly sustained the demurrer on the grounds that appellant failed to allege he could tender the full amount due on his loan and failed to allege facts showing any violation of California's nonjudicial foreclosure scheme embodied in Civil Code sections 2924 through 2924k. Moreover, appellant failed to meet his burden to show how any amendment would change the legal effect of his pleading.

FACTUAL AND PROCEDURAL BACKGROUND

"On appeal from a judgment of dismissal following a demurrer sustained without leave to amend, we assume the truth of all well-pleaded facts, as well as those that are judicially noticeable, but not contentions, deductions or conclusions of fact or law. [Citations.]" (*Van de Kamps Coalition v. Board of Trustees of Los Angeles Community College Dist.* (2012) 206 Cal.App.4th 1036, 1040.)

Appellant's Loan and Foreclosure Proceedings.

In 1991, appellant purchased the property located at 2306 Cheryl Place in Los Angeles (Property). On March 10, 2005, appellant received a $1 million loan (Loan) from Credit Suisse First Boston Financial Corporation (Credit Suisse). The loan was memorialized by a promissory note (Note) that was secured by a deed of trust (DOT) on

the Property. Appellant signed both the Note and the DOT in order to secure payment on the Note. The DOT identified Credit Suisse as both the lender and the trustee, and MERS as the beneficiary under the DOT.

The DOT expressly provided: "The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the 'Loan Servicer') that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law." Beginning in March 2005, appellant made timely payments on his Loan to an entity designated by Credit Suisse. In or about December 2005, appellant received notice from BAC that it was taking over the loan servicing on the Note and directions to make future payments to BAC.

After making late payments on the Loan in 2007 and continuing into 2008, appellant sought and received a loan modification from BAC (then known as Countrywide Home Loans Servicing, LP) in December 2008 and again in November 2009. The loan modifications expressly provided that they amended and supplemented the Note and DOT, required appellant to make monthly principal and interest payments to BAC, and otherwise reconfirmed appellant's obligation to be bound by and comply with the terms of the Note.

Appellant did not make any payments to BAC. In February 2010, BAC wrote to appellant, notifying him that the Loan was in default and describing the manner in which he could cure the default. In April 2010, a BAC loan services specialist contacted appellant to assess his financial situation and explore options to avoid foreclosure. On May 7, 2010, ReconTrust, acting as an agent for the beneficiary under the DOT, recorded a notice of default (Notice of Default) against the Property. Dated May 6, 2010, MERS executed a substitution of trustee and assignment of deed of trust (SOT) substituting ReconTrust as the trustee under the DOT and assigning its beneficial interest in the DOT

to BNY.[1] The SOT was signed on May 11, 2010 by MERS assistant secretary T. Sevillano and recorded on May 20, 2010.

On August 17, 2010, ReconTrust recorded a notice of trustee's sale, setting a sale date of September 7, 2010. After several postponements, the trustee's sale occurred in August 2011.

The Lawsuit.

Appellant filed his original complaint in September 2010; it contained causes of action for slander of title and declaratory relief premised on allegations that defendants lacked authority to service his loan and conduct foreclosure proceedings. Appellant's wife thereafter immediately filed for Chapter 13 bankruptcy. Appellant's complaint was removed to the United States Bankruptcy Court where it was consolidated with his wife's bankruptcy case. By order entered on December 1, 2010, the Bankruptcy Court dismissed the Chapter 13 case for the debtor's failure to appear at a creditors' meeting and to make all required preconfirmation payments. Thereafter, on January 10, 2011, the Bankruptcy Court issued an order remanding the case to state court.

At the same time the Bankruptcy Court was preparing its remand order, appellant proceeded in the trial court, requesting entry of default against BAC and ReconTrust, and applying for an order shortening time on a declaration of state court jurisdiction. Appellant argued that the Bankruptcy Court's remand order vested the trial court with immediate jurisdiction. At a January 20, 2011 hearing, the trial court ruled it lacked jurisdiction until it received a certified copy of the remand order. (See *Spanair S.A. v. McDonnell Douglas Corp.* (2009) 172 Cal.App.4th 348, 356 [according to the federal removal statutes, "the state court's jurisdiction is suspended when the defendant seeking removal gives notice to the state court clerk, and it is reacquired when the district court clerk gives notice to the state court clerk in the form of a certified copy of the remand

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[1] The assignment was part of a "securitization," a practice that involves the pooling and packaging loans for sale to investors. (See *Merrill Lynch Mort. Investors v. Love Funding* (2d. Cir. 2009) 556 F.3d 100, 104 [explaining securitization process for mortgage loans].)

order"].) It therefore declined to rule on appellant's matters. It advised appellant that the courtroom would be dark for the first three weeks of February 2011 and that it would advise the judge handling its cases that a certified copy of the remand order may be received during that period. In addition, it advised appellant that he could apply for a temporary restraining order to stop the trustee's sale in the department handling its cases, but emphasized that appellant could do nothing until the certified copy of the remand order had been received.

Before the trial court acknowledged its receipt of a certified copy of the remand order, appellant made certain discovery requests, BAC and ReconTrust filed a demurrer and motion to strike, and appellant filed his opposition to the demurrer and motion to strike. On March 21, 2011, the trial court filed an Acknowledgement of Receipt of Orders of Dismissal and Remand from the United States Bankruptcy Court. The trial court explained that although the order was received in early February 2011, it was sent directly to the judge temporarily handling its cases while the court was dark, was not accompanied by a cover letter and identified different parties. For those reasons, it took the court staff some period of time to determine the remand order was connected to this case and create an acknowledgement. Shortly after the acknowledgment was filed, appellant sought terminating sanctions or, alternatively, an order to reconsider his motion to determine jurisdiction as of December 2010. In a March 28, 2011 tentative ruling, the trial court addressed the outstanding matters, sustaining the demurrer with leave to amend and denying appellant's requests for sanctions and reconsideration.

On the same day, appellant filed a challenge pursuant to Code of Civil Procedure section 170.1, subdivision (a)(6)(iii), arguing that the trial court—the Honorable Jacqueline A. Connor—should be disqualified because she misrepresented that her court staff would monitor the receipt of the remand order, delayed the filing and docketing of that order, used that delay to determine jurisdiction had not been transferred to state court until March 2011 and prevented appellant from examining the mailing from the Bankruptcy Court. On March 30, 2011, the trial court issued an order striking the statement of disqualification. In pertinent part, the order provided: "Plaintiff's

suggestion that the court intentionally misled him, and later purposefully delayed the matter in order to deprive him of his rights, is incredible and wildly speculative. This purported ground for disqualification is legally insufficient." It further stated that all of appellant's complaints involved official actions taken by the trial court, which, even if erroneous, were not a valid basis for disqualification. Appellant filed a petition for writ of mandate in this Court challenging the order striking the statement of disqualification, which was summarily denied.

On April 27, 2011, the trial court confirmed its tentative ruling sustaining the demurrer with leave to amend. With respect to appellant's cause of action for slander of title, the trial court summarized: "Plaintiff's slander of title claim is based on the allegation that defendants have filed documents to proceed with foreclosure without the authority to enforce collection of the promissory note. First, plaintiff has failed to allege sufficient facts to show how any foreclosure documents recorded by defendants are untrue or caused him economic loss. Second, plaintiff has failed to allege sufficient facts to show how or why the foreclosure is improper or that he can tender full payment of the indebtedness to avoid foreclosure." It further ruled that appellant's second cause of action for declaratory relief suffered from the same factual deficiencies. Moreover, the trial court expressly examined the case law cited by appellant and determined that MERS had the authority to initiate foreclosure proceedings. In addition to ruling on the demurrer, the trial court denied appellant's request for terminating sanctions and for entry of default. Summarizing the essence of appellant's claims, the trial court concluded: "Under the circumstances, it appears that plaintiff is simply attempting to avoid foreclosure in the face of his admitted default on the $1 million loan and subsequent loan modifications, pursuant to which he has failed to make a single payment in over a year."

Before filing a first amended complaint, appellant engaged in discovery, including taking the deposition of Kevin Hoang, BAC's corporate representative.[2] In July 2011, appellant noticed the deposition of BAC employee Linda DeMartini, and BAC and ReconTrust moved to quash on the ground that BAC had already provided a corporate representative and DeMartini lacked personal knowledge about the Loan. Appellant opposed the motion, arguing that DeMartini's testimony in a separate case showed she had knowledge of BAC's storage and other practices. After the parties submitted further briefing and declarations from DeMartini and Hoang, the trial court granted the motion to quash. In a minute order, the trial court ruled that the parties' attempts to meet and confer were unsuccessful, the motion to quash was procedurally proper, and BAC and ReconTrust proposed a reasonable alternative to the requested discovery. It determined that Hoang was the person most knowledgeable with respect to the Loan, and DeMartini was "not the custodian of records for Mr. Feldman's mortgage loan, does not have any possession of custody of relevant books and records, had no involvement with Mr. Feldman's loan and has no personal knowledge relevant to the issues in this action." The trial court added that DeMartini's testimony in a New Jersey action regarding BAC's practice concerning possession of promissory notes had no bearing here, as California law lacks any possession requirement.

Appellant filed the operative first amended complaint (complaint) in August 2011, alleging causes of action for slander of title, declaratory relief and injunctive relief against BAC, ReconTrust, MERS and BNY. Though conceding that he was almost $30,000 in arrears on his payments under the Note as of May 2010, he alleged that defendants had no legal right to collect on the Note or initiate foreclosure proceedings because MERS was not the true beneficiary on the DOT and, consequently, the SOT was without force and effect because MERS had no authority to substitute ReconTrust as the trustee and BNY as the beneficiary; the SOT was not signed by Sevillano, the individual

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[2] Though we granted appellant's motion to augment the record to add several documents including the Hoang deposition transcript, the transcript was not before the trial court at the time of any challenged ruling.

who purported to sign it; and defendants were not in possession of the Note. Appellant further alleged that he was not required to plead he could tender the amount due as a prerequisite for asserting his claims, and that he did not waive his claims by entering into the loan modifications.

The complaint also included a number of allegations concerning a "Pooling and Servicing Agreement" (PSA) under which the Loan was securitized. Appellant alleged that the Note was never properly securitized and hence never became trust property of BNY because it was improperly sold, indorsed, delivered and stored. He asserted that he had standing to raise breaches of the PSA as a third-party beneficiary.

All defendants demurred. They argued appellant failed to allege facts sufficient to constitute a cause of action in that appellant failed to allege his unconditional tender of the amount due on his Loan, he failed to identify any injury he suffered from the asserted procedural irregularities, he alleged none of the requisite elements of a slander of title claim, the allegations established that defendants complied with California's nonjudicial foreclosure scheme and had authority to initiate foreclosure proceedings, and appellant lacked standing to assert a breach of the PSA. In support of their demurrer, defendants sought judicial notice of several documents relating to the Note and DOT.

Appellant opposed the demurrer. He argued that he was not required to allege his ability to tender because defendants lacked legal authority to foreclose and had committed forgery, and he repeated his claims concerning alleged violations of the PSA.

At an October 19, 2011 hearing, the trial court sustained the demurrer without leave to amend. It ruled that appellant's complaint suffered from the same flaws it had identified in its previous order sustaining the first demurrer, stating: "First, there are still insufficient facts in the [first amended complaint] to show how any foreclosure documents recorded by defendants are fraudulent or caused him economic loss. Second, plaintiff has failed to allege sufficient facts to show how or why the foreclosure is improper or that he can tender full payment of the indebtedness to avoid foreclosure." The trial court specifically determined that appellant had failed adequately to plead any exceptions to the tender rule and that his allegations were inadequate to show the

foreclosure was unauthorized. Summarizing, the trial court ruled: "As with the [initial] complaint, plaintiff has failed to allege sufficient facts to state a claim for slander of title, declaratory relief, or injunctive relief. There is no basis for the assertion that these defendants lack standing or authority to foreclose on plaintiff's property. Plaintiff does not dispute owing monies on the $1 million loan he originally obtained from Credit Suisse, which was later modified by defendant BAC. In fact, plaintiff is admittedly in default, having failed to make a single payment on the loan in years." It dismissed the matter with prejudice. This appeal followed.

Motion to Augment and Requests for Judicial Notice.

Prior to filing his opening brief, appellant filed a motion to augment the record and a request for judicial notice, both of which we granted. After briefing had been completed, appellant filed a second motion to augment the record and a second request for judicial notice. Defendants have opposed both the motion and request, and have filed a "defensive" request for judicial notice.

Rule 8.155(a) of the California Rules of Court provides that a party may move to augment the record to include "[a]ny document filed or lodged in the case in superior court . . . ." As explained in *In re Marriage of Forrest & Eaddy* (2006) 144 Cal.App.4th 1202, 1209, "augmentation may be used only to add evidence that was mistakenly omitted when the appellate record was prepared; the record cannot be 'augmented' with material that was not before the trial court." (Accord, *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3; *Electronic Funds Solutions, LLC v. Murphy* (2005) 134 Cal.App.4th 1161, 1172, fn. 4.)

Here, appellant seeks to augment the record with Sevillano's deposition transcript, an exhibit attached to that transcript, an April 2011 consent order between the Comptroller of the Currency of the United States and Bank of America, N.A., and a one-page excerpt of defendants' demurrer to appellant's initial complaint. The first three documents were not before the trial court, and thus the record may not be augmented to

include them.[3] While the entire demurrer was filed in the trial court, appellant has offered only a selective excerpt of that document, and we therefore deny his motion to augment the record with only part of the demurrer. (See Cal. Rules of Court, rule 8.155(a) [allowing the record to be augmented with "[a]ny document"].) We likewise deny appellant's alternative request to take judicial notice of the documents attached to his motion to augment. (*Vons Companies, Inc. v. Seabest Foods, Inc., supra,* 14 Cal.4th at p. 444, fn. 3 [denying motion to augment and alternative request for judicial notice of documents not presented to the trial court, noting that "[r]eviewing courts generally do not take judicial notice of evidence not presented to the trial court" in the absence of exceptional circumstances].)

Appellant's separate request for judicial notice is addressed to 10 documents (tabbed as six documents): Two copies of the PSA; an August 2012 unlawful detainer complaint filed by BNY against appellant and others; BNY's separate statement of undisputed facts and separate statement of "additional" undisputed facts in support of its motion for summary judgment in the unlawful detainer action; excerpts of the deposition of BNY's corporate representative in the unlawful detainer action; two copies of substitutions of trustee involving trustors Chan Yu Tang and Pao Chang Tang; and the declaration of Bart Baggett concerning his opinion on the authenticity of Judy Freeman's signature, together with Baggett's curriculum vitae. In the event that appellant's request is granted, defendants seek judicial notice of a notice of errata and correction of BNY's separate statement of undisputed facts.

Rule 8.252(a) of the California Rules of Court sets forth the specific requirements that a party requesting judicial notice pursuant to Evidence Code section 459 must satisfy. The moving party must serve and file a separate motion with a proposed order

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[3] The Sevillano deposition transcript and the exhibit were attached to an ex parte application that appellant expressly withdrew prior to the trial court's hearing or ruling on it. We decline to permit appellant to augment the record with materials he removed from the trial court's consideration. (See the *People v. Brown* (1993) 6 Cal.4th 322, 332 [a party "cannot challenge a lower court's ruling and then 'augment the record' with information not presented to (or withheld from) the lower court"].)

and a copy of the matter sought to be noticed; the motion must state why the matter is relevant, whether it was presented to the trial court, and whether it relates to proceedings occurring after the appealed judgment; and, if the matter was not presented to the trial court, the motion must state why the matter is subject to judicial notice under Evidence Code sections 451, 452 or 453. (Cal. Rules of Court, rule 8.252(a).) In other words, the proffered matters must be both relevant and statutorily subject to judicial notice. Each of appellant's proffered items fails to satisfy at least one of these two prerequisites.

The two copies of the PSA are not the type of matter that is subject to judicial notice. (*Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1145 ["we hold the existence of a contract between private parties cannot be established by judicial notice under Evidence Code section 452, subdivision (h)"].) While this Court may take judicial notice of pleadings and motions filed in the unlawful detainer action (Evid. Code, § 452, subd. (d)(1)), we may not take judicial notice of the truth of any statements contained therein. (See *Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1055 ["court may take judicial notice that pleadings were filed containing certain allegations and arguments [citation], but a court may not take judicial notice of the truth of the facts alleged"]; *Williams v. Wraxall* (1995) 33 Cal.App.4th 120, 130, fn. 7 [court "cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings"].) The documents therefore are not relevant to this action.

Appellant cites no authority supporting his request for judicial notice of deposition excerpts from BNY and Baggett's declaration, nor have we located any. To the contrary, the court in *Johnson v. Honeywell Internat. Inc.* (2009) 179 Cal.App.4th 549, 559–560, explained why judicial notice of such matters is not permitted: "'The hearing on demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of affidavits, declarations, depositions, and other such material which was filed on behalf of the adverse party and which purports to contradict the allegations and contentions of the plaintiff.' [Citations.]" Finally, while a recorded substitution of trustee is the type of document of which we may take judicial notice (see *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264–265), a

substitution of trustee involving parties who are strangers to this action is irrelevant. Accordingly, we deny appellant's second request for judicial notice as well as defendants' contingent request for judicial notice.

DISCUSSION

Appellant challenges three rulings: The order striking the statement of disqualification, the order granting the motion to quash and the order sustaining the demurrer without leave to amend. We find no merit to any of appellant's challenges.

I. Standards of Review.

First, though the question whether "a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial" (Code Civ. Proc., § 170.1, subd. (a)(6)(A)(iii)) might appear to be one of fact, courts have determined that "'[w]here the facts are undisputed, . . . the disqualification of the judge becomes a question of law rather than of fact.' [Citations.]" (*Flier v. Superior Court* (1994) 23 Cal.App.4th 165, 171.) We independently review a question of law presented in undisputed facts. (E.g., *In re Marriage of Blazer* (2009) 176 Cal.App.4th 1438, 1443.)

Second, we review an order granting a motion to quash for an abuse of discretion. (*Thomas v. Anderson* (2003) 113 Cal.App.4th 258, 271; see *Toshiba America Electronic Components v. Superior Court* (2004) 124 Cal.App.4th 762, 767–768 [discovery rulings reviewed for an abuse of discretion]; *Liberty Mutual Ins. Co. v. Superior Court* (1992) 10 Cal.App.4th 1282, 1286–1287 [same].)

Finally, we review de novo a trial court's sustaining of a demurrer without leave to amend, exercising our independent judgment as to whether a cause of action has been stated as a matter of law. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126; *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 300.) We assume the truth of properly pleaded allegations in the complaint and give the complaint a reasonable interpretation, reading it as a whole and with all its parts in their context. (*Aubrey v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966–967.) However, we "do not assume the truth of contentions, deductions, or conclusions of fact or law and may disregard allegations that are contrary to the law or to a fact which may be judicially noticed."

(*Dutra v. Eagleson* (2006) 146 Cal.App.4th 216, 221.) "Under the doctrine of truthful pleading, the courts 'will not close their eyes to situations where a complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts which are judicially noticed.' [Citation.] 'False allegations of fact, inconsistent with annexed documentary exhibits [citation] or contrary to facts judicially noticed [citation], may be disregarded . . . .' [Citations.]" (*Hoffman v. Smithwoods RV Park, LLC* (2009) 179 Cal.App.4th 390, 400.)

We may affirm the judgment on any of the grounds raised by the demurrer. (*Van de Kamps Coalition v. Board of Trustees of Los Angeles Community College Dist., supra,* 206 Cal.App.4th at p. 1044; *Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 517.) We apply the abuse of discretion standard in reviewing a trial court's denial of leave to amend. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497–1498.) Appellant bears the burden of showing that the trial court erred in sustaining the demurrer or abused its discretion in denying leave to amend. (*Zelig v. County of Los Angeles, supra,* 27 Cal.4th at p. 1126; *Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1038.)

II. The Trial Court Properly Struck the Statement of Disqualification.

Appellant argues that the judgment should be reversed for judicial bias, evidenced primarily by the approximate six-week time period between the Bankruptcy Court's issuance of a remand order and the trial court's filing an acknowledgement of receipt of a certified copy of that order. He argues that the trial court's failure to assume jurisdiction over the matter during that time demonstrated bias. We disagree.

Appellant sought the trial court's disqualification under Code of Civil Procedure section 170.1, subdivision (a)(6)(A)(iii), which provides that "(a) A judge shall be disqualified if any one or more of the following is true: [¶] . . . [¶] (6)(A) For any reason: . . . (iii) A person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." The standard for disqualification under this statute is objective. (*Roitz v. Coldwell Banker Residential Brokerage Co.* (1998) 62 Cal.App.4th 716, 723; *Flier v. Superior Court* (1994) 23 Cal.App.4th 165, 170.) "If a reasonable

member of the public at large, aware of all the facts, would fairly entertain doubts concerning the judge's impartiality, disqualification is mandated. The existence of actual bias is not required. [Citation.]" (*Flier v. Superior Court, supra,* at p. 170.)

"'Bias or prejudice consists of a "mental attitude or disposition of the judge towards [or against] a party to the litigation. . . ."' [Citations.] Neither strained relations between a judge and an attorney for a party nor '[e]xpressions of opinion uttered by a judge, in what he conceived to be a discharge of his official duties, are . . . evidence of bias or prejudice. [Citation.]' [Citation.]" (*Roitz v. Coldwell Banker Residential Brokerage Co., supra,* 62 Cal.App.4th at p. 724.) Thus, a party cannot premise a claim of bias on a judge's statements made in her official capacity. (*Jack Farenbaugh & Son v. Belmont Construction, Inc.* (1987) 194 Cal.App.3d 1023, 1031.) Moreover, "[e]rroneous rulings against a litigant, even when numerous and continuous, do not establish a charge of bias and prejudice." (*Dietrich v. Litton Industries, Inc.* (1970) 12 Cal.App.3d 704, 719.)

Here, appellant's claim of bias was premised on an isolated and correct ruling.[4] The trial court determined that it lacked jurisdiction over the matter until it received a certified copy of the Bankruptcy Court's order remanding the case. (See *Spanair S.A. v. McDonnell Douglas Corp., supra,* 172 Cal.App.4th at p. 356.) Judge Connor expressly advised appellant that the order could be received during a period where her courtroom would be dark and advised appellant of the courtroom that would be handling her cases during that time. In Judge Connor's absence, the order arrived and remained unopen until her return. Though appellant has speculated that the trial court directed her clerk not to open her mail and has implied that the trial court did so for the purpose of thwarting

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[4] Appellant also references a comment during a hearing that the trial court directed to defense counsel, stating "I—you need to pay a little more attention to some of the issues Mr. Feldman brings up." We discern no indication of bias from this remark. (See *United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97, 106, fn. 6 ["the partisan litigant emotionally involved in the controversy underlying the lawsuit is not the disinterested objective observer whose doubts concerning the judge's impartiality provide the governing standard"].)

appellant's efforts to litigate his case, his claims are nothing more than wild accusations that lack any support in the record. "A party must allege concrete facts that demonstrate the challenged judicial officer is contaminated with bias or prejudice. . . . Indeed, a party's unilateral perception of an appearance of bias cannot be a ground for disqualification unless we are ready to tolerate a system in which disgruntled or dilatory litigants can wreak havoc with the orderly administration of dispute-resolving tribunals." (*Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 792.) Because appellant failed to meet his burden to demonstrate bias, the statement of disqualification was properly stricken.

III. The Trial Court Properly Exercised Its Discretion in Granting the Motion to Quash.

Appellant next argues that the trial court abused its discretion in granting defendants' motion to quash the deposition notice directed to BAC employee DeMartini. He claimed that her testimony in a New Jersey case concerning BAC's practice of storing notes for BNY tended to show BNY's nonownership of his Note and DOT. (See *Kemp v. Countrywide Home Loans, Inc.* (*In re Kemp*) (Bankr. D.N.J. 2010) 440 B.R. 624, 628.) The trial court ruled that DeMartini's testimony was not relevant for two reasons. First, DeMartini had no involvement with or personal knowledge of appellant's Loan. Second, while testimony concerning BAC's storage custom and practice was relevant to the New Jersey case because New Jersey law requires that one seeking enforcement of a negotiable instrument be in physical possession of it, California law does not require that a trustee have physical possession of a note in order to foreclose. (Cf. *Id.* at p. 630 ["Because the Bank of New York never had possession of the note, it can not qualify as a 'holder' under the New Jersey UCC" entitled to enforce the note] with *Jensen v. Quality Loan Serv. Corp.* (E.D.Cal. 2010) 702 F.Supp.2d 1183, 1189 ["California law 'does not require possession of the note as a precondition to non-judicial foreclosure under a Deed of Trust'"].) For that reason, her storage testimony had no bearing on the issues raised by appellant.

The Civil Discovery Act allows a party to "obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action . . . if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. Discovery may relate to the claim or defense of the party seeking discovery or of any other party to the action." (Code Civ. Proc., § 2017.010; see *John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1186.) A trial "court shall limit the scope of discovery if it determines that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." (Code Civ. Proc., § 2017.020, subd. (a).)

Here, the trial court properly exercised its discretion in granting the motion to quash, as DeMartini's testimony was not relevant, and therefore neither admissible nor calculated to lead to admissible evidence. (See Evid. Code, § 350 [only relevant evidence is admissible].) DeMartini averred that she had "no involvement" with appellant's Loan, that she had not reviewed documents or electronic records relating to the Loan and that she was unable to testify about any action or inaction taken with respect to the Loan. In light of DeMartini's lack of personal knowledge, the trial court was well within its discretion to conclude that appellant failed to establish how DeMartini's testimony was relevant and to find that defendants' designation of Hoang as the person most knowledgeable about the Loan was appropriately responsive to appellant's discovery request.

In addition, the trial court properly concluded that DeMartini's testimony concerning BAC's storage custom and practice was not relevant, explaining that "California law differs substantially from the New Jersey law applied in *In re Kemp* because California law does not require that the trustee have physical possession of the note in order to proceed with nonjudicial foreclosure." (See, e.g., *Shuster v. BAC Home Loans Servicing, LP* (2012) 211 Cal.App.4th 505, 511 ["California's statutory nonjudicial foreclosure scheme ([Civ. Code,] §§ 2924–2924k) does not require that the foreclosing party have a beneficial interest in or physical possession of the note"]; *Debrunner v.*

Deutsche Bank National Trust Co. (2012) 204 Cal.App.4th 433, 440, 441 ["the procedures to be followed in a nonjudicial foreclosure are governed by [Civ. Code] sections 2924 through 2924k, which do not require that the note be in the possession of the party initiating the foreclosure" and "nothing in the applicable statutes that precludes foreclosure when the foreclosing party does not possess the original promissory note"]; *Hamilton v. Bank of Blue Valley* (E.D.Cal. 2010) 746 F.Supp.2d 1160, 1181–1182 ["'Under Civil Code section 2924, no party needs to physically possess the promissory note'" and therefore "[a]n 'allegation that the trustee did not have the original note or had not received it is insufficient to render the foreclosure proceeding invalid'"].) Indeed, because physical possession of a note is not a prerequisite to nonjudicial foreclosure in California, DeMartini's custom and practice testimony was not relevant, and we see no basis to disturb the order granting the motion to quash.

IV. The Trial Court Properly Sustained the Demurrer Without Leave to Amend.

A. Appellant's Failure to Allege a Valid and Viable Tender of the Amount Due Barred His Claims.

Though appellant captioned his causes of action as slander of title, declaratory relief and injunctive relief, the gist of appellant's claims was that defendants wrongfully attempted to collect on appellant's Note, wrongfully initiated foreclosure proceedings and lacked authority to foreclose. The trial court characterized appellant's claims as "based on the allegation that defendants have filed documents to proceed with foreclosure without the authority to enforce collection of the promissory note." It determined that the "tender rule" applied to preclude his claims. We agree.

"As a general rule, a debtor cannot set aside the foreclosure based on irregularities in the sale without also alleging tender of the amount of the secured debt. [Citations.]" (*Shuster v. BAC Home Loans Servicing, LP, supra*, 211 Cal.App.4th at p. 512; accord, *Onofrio v. Rice* (1997) 55 Cal.App.4th 413, 424 ["'Without an allegation of such a tender in the complaint that attacks the validity of the sale, the complaint does not state a cause of action'"]; *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1109 [sustaining demurrer because "appellants are required to allege tender of the amount of

United's secured indebtedness in order to maintain any cause of action for irregularity in the sale procedure"]; *Arnolds Management Corp. v. Eischen* (1984) 158 Cal.App.3d 575, 578 ["an action to set aside a trustee's sale for irregularities in sale notice or procedure should be accompanied by an offer to pay the full amount of the debt for which the property was security"]; *Karlsen v. American Sav. & Loan Assn.* (1971) 15 Cal.App.3d 112, 117 ["A valid and viable tender of payment of the indebtedness owing is essential to an action to cancel a voidable sale under a deed of trust"].) "The rationale behind the rule is that if [the borrower] could not have redeemed the property had the sale procedures been proper, any irregularities in the sale did not result in damages to the [borrower]." (*FPCI Re-Hab 01 v. E & G Investments, Ltd.* (1989) 207 Cal.App.3d 1018, 1022.)

The tender rule is strictly enforced. (*Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 439.) "In other words, with respect to tender, 'it is a debtor's responsibility to make an unambiguous tender of the entire amount due or else suffer the consequence that the tender is of no effect.' [Citation.]" (*Ibid*.) Absent an alleged and actual tender, a complaint seeking to set aside foreclosure proceedings fails to state a viable cause of action. (*Karlsen v. American Sav. & Loan Assn., supra*, 15 Cal.App.3d at p. 117.)

Appellant never alleged an ability to tender. To the contrary, in his complaint he conceded that he was in arrears both before and after the loan modifications, and judicially-noticed documents showed that he remained in arrears as of early 2010. On appeal, appellant does not contend that he has the ability to tender, but rather, argues that his allegations showed either that he satisfied an exception to the tender rule or was not required to tender due to the invalidity of the foreclosure sale. The court in *Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 112–113, summarized the exceptions: "First, if the borrower's action attacks the validity of the underlying debt, a tender is not required since it would constitute an affirmation of the debt. [Citations.] [¶] Second, a tender will not be required when the person who seeks to set aside the trustee's sale has a counterclaim or setoff against the beneficiary. In such cases, it is deemed that the tender and the counterclaim offset one another, and if the offset is equal to or greater than the amount due, a tender is not required. [Citation.] [¶] Third, a tender may not be required

where it would be inequitable to impose such a condition on the party challenging the sale. [Citation.] . . . . [¶] Fourth, no tender will be required when the trustor is not required to rely on equity to attack the deed because the trustee's deed is void on its face. [Citation.]"

Appellant's allegations fail to support any of the established exceptions to the tender rule. Instead, his allegations endeavor to show that defendants lacked authority to foreclose. But while a borrower need not tender when the deed of trust is void on its face (*Shuster v. BAC Home Loans Servicing, LP, supra*, 211 Cal.App.4th at p. 512; *Dimock v. Emerald Properties* (2000) 81 Cal.App.4th 868, 878), the borrower must allege an ability to tender when the challenged foreclosure sale is voidable due to an irregularity in the foreclosure process (*Dimock v. Emerald Properties, supra*, at pp. 877–878; *Karlsen v. American Sav. & Loan Assn., supra,* 15 Cal.App.3d at p. 117). Here, appellant's multiple challenges to the foreclosure process would, if successful, render the foreclosure sale only voidable but not void. Accordingly, appellant failed to allege any basis for avoidance of the tender rule, and the lack of any allegations demonstrating his ability to make a valid and viable tender of the amount owing was fatal to his complaint.

B. Appellant's Challenges to the Foreclosure Process Did Not Obviate His Duty to Tender.

Even if we could construe appellant's challenges to the foreclosure process as falling within one of the enumerated exceptions to the tender rule as an attack on the validity of the underlying debt or a claim that the foreclosure was void, our conclusion would remain unchanged. We agree with the trial court's determination that appellant failed to allege sufficient facts to show that defendants lacked standing or authority to proceed with the foreclosure of the Property.

1. MERS's and ReconTrust's Authority.

As explained in *Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830, "Civil Code sections 2924 through 2924k provide a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust." (Accord, *Melendrez v. D & I Investment, Inc.* (2005) 127 Cal.App.4th 1238, 1249; *Knapp*

v. Doherty (2004) 123 Cal.App.4th 76, 86.) The scheme is intended to be exhaustive, and thus courts may not incorporate additional or unrelated requirements into the foreclosure process. (*Moeller v. Lien, supra,* at p. 834.) Further, "[a] nonjudicial foreclosure sale is accompanied by a common law presumption that it 'was conducted regularly and fairly.' [Citations.] This presumption may only be rebutted by substantial evidence of prejudicial procedural irregularity. [Citation.] . . . . It is the burden of the party challenging the trustee's sale to prove such irregularity and thereby overcome the presumption of the sale's regularity. [Citation.]" (*Melendrez v. D & I Investment, Inc., supra,* at p. 1258; see also *Fontenot v. Wells Fargo Bank, N.A., supra,* 198 Cal.App.4th at p. 272 ["a plaintiff in a suit for wrongful foreclosure has generally been required to demonstrate the alleged imperfection in the foreclosure process was prejudicial to the plaintiff's interests"]; *Knapp v. Doherty, supra,* at p. 86, fn. 4 ["A nonjudicial foreclosure sale is presumed to have been conducted regularly and fairly; one attacking the sale must overcome this common law presumption 'by pleading and proving an improper procedure and the resulting prejudice'"].) "Prejudice is not presumed from 'mere irregularities' in the process. [Citation.]" (*Fontenot v. Wells Fargo Bank, N.A., supra,* at p. 272.)

Appellant maintains that the foreclosure was without legal effect because MERS and/or ReconTrust "had no authority to act as principal as the foreclosing party or as agent of the foreclosing party against Plaintiff's property." Preliminarily, we note "that the statutory scheme ([Civ. Code,] §§ 2924–2924k) does not provide for a preemptive suit challenging standing. Consequently, plaintiffs' claims for damages for wrongful initiation of foreclosure and for declaratory relief based on plaintiffs' interpretation of section 2924, subdivision (a), do not state a cause of action as a matter of law." (*Robinson v. Countrywide Home Loans, Inc.* (2011) 199 Cal.App.4th 42, 46.) The court in *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1155, reasoned that "[t]he recognition of the right to bring a lawsuit to determine a nominee's authorization to proceed with foreclosure on behalf of the noteholder would fundamentally undermine the nonjudicial nature of the process and introduce the possibility of lawsuits filed solely for the purpose of delaying valid foreclosures."

Nonetheless, appellant's contention also fails on the merits. Under the statutory scheme, a "trustee, mortgagee, or beneficiary, or any of their authorized agents" may record the notice of default—the document that initiates the nonjudicial foreclosure process. (Civ. Code, § 2924, subd. (a)(1); see also Civ. Code, § 2924b, subd. (b)(4) ["A 'person authorized to record the notice of default or the notice of sale' shall include an agent for the mortgagee or beneficiary, an agent of the named trustee, any person designated in an executed substitution of trustee, or an agent of that substituted trustee"].) Appellant signed the DOT and initialed the page identifying MERS as the nominee for the lender and the lender's successors and the beneficiary under the DOT. (See *Gomes v. Countrywide Home Loans, Inc.*, *supra,* 192 Cal.App.4th at p. 1156, fn. 7 ["under California law MERS may initiate a foreclosure as the nominee, or agent, of the noteholder"]; see also *Calvo v. HSBC Bank USA, N.A.* (2011) 199 Cal.App.4th 118, 125 [holding that MERS, as the lender's nominal beneficiary and agent, was entitled to invoke the power of sale in a deed of trust].)

Civil Code section 2924, subdivision (a)(1) likewise authorized ReconTrust, expressly acting as MERS's agent, to record the Notice of Default. (See *Perlas v. Mortgage Elec. Registration Systems, Inc.* (N.D.Cal. 2010) 2010 WL 3079262 at *4 ["California law also explicitly permits the holder of the note to authorize a third party to commence foreclosure proceedings. . . . There is no requirement in California that the foreclosure be initiated by the lender itself"]; see also *Debrunner v. Deutsche Bank National Trust Co., supra,* 204 Cal.App.4th at p. 441 ["'There is no stated requirement in California's non-judicial foreclosure scheme that requires a beneficial interest in the Note to foreclose'"].) As the trial court found, it was of no consequence that MERS did not record the SOT, which substituted ReconTrust as the trustee and assigned its beneficial interest under the DOT to BNY, until after the Notice of Default had been recorded. ReconTrust had authority to record the May 7, 2010 Notice of Default without the SOT. (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 801.)

Moreover, the beneficiary under a deed of trust is entitled to make a substitution of trustee to conduct a nonjudicial foreclosure and sale. (*Kachlon v. Markowitz* (2008) 168

Cal.App.4th 316, 334; see also *Pedersen v. Greenpoint Mortgage Funding, Inc.* (E.D.Cal. 2011) 2011 WL 3818560 at *19 ["In this case, as GreenPoint's agent, MERS can substitute a trustee or assign the beneficial interest under the deed"]; *Hensley v. Bank of New York Mellon* (E.D.Cal. 2011) 2011 WL 2118810 at *3 [under language in deed of trust that was "consistent with numerous cases in which courts have held that where MERS acts as a beneficiary under a deed of trust, it has the right to assign its interest, . . . MERS properly substituted ReconTrust as a trustee and assigned its beneficial interest to BNY Mellon"].) The SOT was dated May 6, 2010, notarized on May 11, 2010 and recorded on May 20, 2010. Without authority, appellant contends that the fact the notarization and recordation dates fell after the Notice of Default affected ReconTrust's authority to record the August 2010 notice of trustee's sale and conduct the August 2011 sale. The court in *Pederson v. Greenpoint Mortgage Funding, Inc., supra,* 2011 WL 3818560, rejected an identical contention, finding that a trustee who was substituted after a notice of default had been recorded had authority to conduct the foreclosure sale. (*Id*. at *16, *21 ["Assuming Notice of Default was properly filed by an agent of the trustee or beneficiary, Quality assumed the trustee's powers upon the recording of the substitution and properly conducted the sale"]; see also Civ. Code, § 2934a, subd. (d) ["Once recorded, the substitution shall constitute conclusive evidence of the authority of the substituted trustee or his or her agents to act pursuant to this section"]; *Bascos v. Federal Home Loan Mortg. Corp.* (C.D.Cal. 2011) 2011 WL 3157063 at *5 [holding agent of MERS had authority to execute notice of default before it had been substituted in as the trustee].) The trial court properly ruled that "RECONTRUST properly recorded the Notice of Default as MERS' agent, then properly recorded the Notice of Trustee's sale as the substituted trustee."

2. Forgery.

Appellant further alleged that the notice of trustee's sale and consequent sale were void because Sevillano's signature on the SOT was forged. More specifically, he alleged that Sevillano did not sign the SOT or authorize anyone to sign for her; Sevillano's deposition testimony would show she could not verify the signature; an expert would

opine the signature likely was not hers; and even if the signature were hers it was invalid because she signed on behalf of ReconTrust and not MERS. The trial court ruled that appellant's allegations the SOT was not signed by a person authorized to do so were "purely speculative" and an insufficient basis to support a claim the foreclosure was unauthorized. (See *Shuster v. BAC Home Loans Servicing, LP* (2011) 211 Cal.App.4th 505, 513 [rejecting speculative allegations about note's forgery where the plaintiffs were "unable to articulate any facts supporting this theory or demonstrating prejudice"].)

We agree that the allegation someone other than Sevillano signed her name on the SOT is an inadequate attack on the foreclosure process. Generally, signing someone else's name is legally significant only if it was unauthorized and perpetrated with fraudulent intent. (See Pen. Code, § 470 [forgery requires signer's intent to defraud and knowledge that he or she lacks authority to sign the name of another person]; see also *Lewis v. Superior Court* (1990) 217 Cal.App.3d 379, 387 [crime of forgery under Pen. Code, § 470 derives from common law definition of forgery].) Appellant did not allege that the signature, even if made by someone other Sevillano, was made without her permission or that the actual signer intended to perpetrate a fraud.

Appellant likewise failed to allege that the signer was not acting with MERS's permission or as MERS's agent. (See *Selby v. Bank of America, Inc.* (S.D.Cal. 2011) 2011 WL 902182 at *3 [the plaintiff failed to allege individual lacked authority to sign as an agent for the bank even though he was employed by loan servicing agency].) At a minimum, appellant's allegations, together with the judicially-noticed foreclosure documents, showed that MERS conferred authority on the signer (or approved the SOT) by ratifying both the signer's act of signing Sevillano's name and the substitution of trustees after the fact. (See Civ. Code, § 2307.) It is well settled that "a principal may ratify the forgery of his signature by his agent," so that the agent is deemed to have the requisite authority at the time she signed. (*Rakestraw v. Rodrigues* (1972) 8 Cal.3d 67, 73, 74.) After the SOT was recorded, new trustee ReconTrust later served and recorded the notice of trustee's sale, held the sale, and the trustee's deed conveying the Property to BNY was recorded. Appellant did not allege that MERS, ReconTrust or BNY objected

to the documents or to the corresponding steps of the foreclosure process or were unaware of them. The inference from the complaint, therefore, is that a ratification occurred and forgery fails to constitute a basis for setting aside or voiding the foreclosure.

In any event, even if appellant had alleged facts to show that the signature on the SOT was a forgery and neither authorized nor ratified by MERS, we would still find such allegations an inadequate basis for challenging the foreclosure as matter of law. Civil Code section 2934a, subdivision (d) provides: "A trustee named in a recorded substitution of trustee shall be deemed to be authorized to act as the trustee under the mortgage or deed of trust for all purposes from the date the substitution is executed by the mortgagee, beneficiaries, or by their authorized agents. Nothing herein requires that a trustee under a recorded substitution accept the substitution. Once recorded, the substitution [of trustee] shall constitute conclusive evidence of the authority of the substituted trustee or his or her agents to act pursuant to this section."

"Conclusive evidence" cannot be contradicted by any evidence to the contrary. (*Pullen v. Heyman Bros.* (1945) 71 Cal.App.2d 444, 452; cf. *Federal Deposit Ins. Corp. v. Superior Court* (1997) 54 Cal.App.4th 337, 346 [a conclusive presumption is not a rule of evidence but substantive rule of law].) Thus, a recorded substitution of trustee conclusively establishes the authority of the substituted trustee to act. Here, the SOT was recorded and the trial court took judicial notice of its recordation. (See *Fontenot v. Wells Fargo Bank, N.A., supra,* 198 Cal.App.4th at p. 265.) Moreover, the SOT was notarized, and a notary's acknowledgment is prima facie evidence that Sevillano signed the SOT. (Evid. Code, § 1451.) As a matter of law, therefore, ReconTrust had authority pursuant to the SOT to act as the trustee under the DOT, to record the notice of trustee's sale, to conduct that sale, and to issue the trustee's deed to BNY.

Finally, appellant's forgery allegations are of no consequence because he failed to show how he was prejudiced by the SOT. (See, e.g., *Fontenot v. Wells Fargo Bank, N.A., supra,* 198 Cal.App.4th at p. 272 [no prejudice shown from MERS's assignment of a note].) The genuineness of the signature on a substitution of trustee form is relevant only to whether the lender authorized a change of trustee; who the trustee is makes no

difference to the borrower. (*U.S. Hertz, Inc. v. Niobrara Farms* (1974) 41 Cal.App.3d 68, 85.) The Note and DOT permitted initiation of the nonjudicial foreclosure process regardless of who the trustee was, and the SOT did not adversely affect appellant's default, failure to cure, or ability to redeem the property as long as the successor trustee named in the SOT followed the statutory process. Accordingly, appellant's forgery allegations failed to show the foreclosure was unauthorized.

3. The PSA.

Appellant further alleged that the foreclosure was void and without legal effect because of irregularities in the securitization process—primarily BAC's failure to endorse or properly endorse the Note in breach of the PSA and BNY's failure to maintain the Note also in breach of the PSA. In both its order granting the motion to quash and its order sustaining the demurrer, the trial court ruled that appellant's allegations, again, failed to constitute a basis to avoid the tender rule.

We agree. The court in *Arabia v. BAC Home Loans Servicing, L.P.* (2012) 208 Cal.App.4th 462, 473, explained in a commonsense manner why a debtor's allegations concerning a lender's breach of a PSA simply do not matter: There, "Arabia obtained a mortgage loan secured by a deed of trust recorded against the property. If Arabia failed to make his payments, he faced the possibility of foreclosure. This is what happened here. There is no dispute that Arabia has failed to make his payments on the First Loan and is subject to foreclosure. Whether BAC has breached an agreement with BONY does not alter these undisputed facts or the consequence arising out of Arabia's failure to repay the First Loan."

Indeed, to the extent that a plaintiff's challenge to a foreclosure is premised on matters concerning the securitization of the loan, "courts have uniformly rejected the argument that securitization of a mortgage loan provides the mortgagor with a cause of action." (*Rodenhurst v. Bank of America* (D.Haw. 2011) 773 F.Supp.2d 886, 898; accord, *Alvarado v. Bank of America, N.A.* (E.D.Cal. 2013) 2013 WL 28584 at *10 [the plaintiff's "securitization claims fail to support a necessary irregularity to challenge foreclosure of the property"]; *Shkolnikov v. JPMorgan Chase Bank* (N.D.Cal. 2012) 2012

WL 6553988 at *13 ["The majority position is that plaintiffs lack standing to challenge noncompliance with a PSA in securitization unless they are parties to the PSA or third party beneficiaries of the PSA"]; *Armeni v. America's Wholesale Lender* (C.D.Cal. 2012) 2012 WL 603242 at *3 ["The Court finds that plaintiff lacks standing to challenge the process by which his mortgage was (or was not) securitized because he is not a party to the PSA"]; *Bascos v. Federal Home Loan Mortg. Corp., supra*, 2011 WL 3157063 at *6 ["Plaintiff has no standing to challenge the validity of the securitization of the loan as he is not an investor of the loan trust"].) Recently, the court in *Juntilla v. Aurora Loan Services, LLC* (C.D.Cal. 2013) 2013 WL 1303820 at *3 dismissed a complaint alleging, among other claims, that a note lacked proper endorsements in violation of a PSA, reasoning that "debtors such as Plaintiff here are not parties to PSAs, and therefore have no standing to challenge assignments based on noncompliance with the terms of a PSA. [Citation.]"

Appellant likewise has no basis to challenge whether the Note was stored or maintained in accordance with the PSA. As we discussed in connection with the order granting the motion to quash, nothing in this comprehensive framework governing nonjudicial foreclosure "precludes foreclosure when the foreclosing party does not possess the original promissory note." (*Debrunner v. Deutsche Bank National Trust Co., supra*, 204 Cal.App.4th at p. 440.) A "beneficial interest in or physical possession of the note" is unnecessary to confer "statutory authority to commence foreclosure." (*Shuster v. BAC Home Loans Servicing, LP, supra*, 211 Cal.App.4th at pp. 511–512.) Because "[u]nder California law, there is no requirement for the production of an original promissory note prior to initiation of a nonjudicial foreclosure. . . . the absence of an original promissory note in a nonjudicial foreclosure does not render a foreclosure invalid. [Citations.]" (*Pantoja v. Countrywide Home Loans, Inc.* (N.D.Cal. 2009) 640 F.Supp.2d 1177, 1186; see also *Hafiz v. Greenpoint Mort. Funding, Inc.* (N.D.Cal. 2009) 652 F.Supp.2d 1039, 1043 ["'Production of the original note is not required to proceed with a nonjudicial foreclosure'"]; *Neal v. Juarez* (S.D.Cal. 2007) 2007 WL 2140640 at *8 ["the allegation that the trustee did not have the original note or had not received it is

insufficient to render the foreclosure proceeding invalid"].) Thus, appellant's allegations concerning the possession or storage of the Note are insufficient to undermine the foreclosure process.

In sum, appellant's complaint failed to allege any facts implicating a valid exception to the tender rule, and "[i]n the absence of an allegation of tender or offer of tender, the trial court properly sustained the demurrer[] without leave to amend." (*Shuster v. BAC Home Loans Servicing, LP, supra*, 211 Cal.App.4th at pp. 512, 513.)

C. Though Not Alleged as Wrongful Foreclosure, Appellant's Claims Fail.

While appellant's allegations were consistent with those typically pled in connection with claims for wrongful foreclosure, he captioned his three causes of action as slander of title, declaratory relief and injunctive relief. As did the trial court, we briefly address the viability of appellant's claims as alleged.

The elements of a cause of action for slander of title are: (1) false and unprivileged disparagement; (2) of title to property; and (3) resulting in actual pecuniary damage. (*Glass v. Gulf Oil Corp.* (1970) 12 Cal.App.3d 412, 419.) As the trial court summarized, appellant's slander of title claim was based on the allegation that defendants filed documents to proceed with foreclosure that were false because defendants lacked the authority to foreclose. In *Kachlon v. Markowitz, supra*, 168 Cal.App.4th at page 333, the court held that the performance of statutory nonjudicial foreclosure procedures, including the mailing and delivery of notices, constituted privileged communications under Civil Code section 47, subdivision (c)(1), and therefore the foreclosing defendants were immune from a slander of title claim. (Accord, *Green v. Alliance Title* (E.D.Cal. 2010) 2010 WL 3505072 at *19 ["Plaintiff's slander of title claim fails because notices filed pursuant to a non-judicial foreclosure action constitute privileged communications"].)

Regardless of the privileged nature of a foreclosing defendant's actions, courts have concluded that where, as here, the complaint fails to show why the defendants lacked authority to initiate and proceed with a foreclosure, the plaintiff has no viable cause of action for slander of title. (See, e.g., *Nogaliza v. U.S. Bank, N.A.* (N.D.Cal.

2012) 2012 WL 3026404 at *3 [rejecting allegation that MERS lacked authority to assign its interest and therefore dismissing slander of title claim]; *Marty v. Wells Fargo Bank* (E.D.Cal. 2011) 2011 WL 1103405 at *7 [finding "fundamentally flawed" allegations that the defendants improperly filed a notice of default without authority and lacked standing to foreclose and therefore dismissing slander of title claim].) Likewise, courts have found a cause of action for slander of title based on an alleged wrongful foreclosure fails to state a claim where the plaintiff fails to allege tender. (See, e.g., *Vann v. Wells Fargo Bank* (N.D.Cal. 2012) 2012 WL 1910032 at *15 [slander of title claim dismissed where the plaintiff failed to allege facts showing foreclosure sale was unlawful and failed to allege tender]; *Cross v. Wells Fargo Bank, N.A.* (C.D.Cal. 2011) 2011 WL 6136734 at *7 [because the plaintiffs did "not allege their willingness to tender the amount, their allegations for slander of title fail[]"]; *Bouyer v. Countrywide Bank, FSB* (N.D.Cal. 2009) 2009 WL 8652921 at *7 [holding that "tender of the amount owed is a condition precedent" to claim for slander of title based on allegations of wrongful foreclosure and irregularity in the foreclosure process].)

Appellant's causes of action for declaratory relief and injunctive relief merely incorporated the factual allegations supporting appellant's slander of title cause of action. Consequently, appellant's failure to allege defendants' lack of authority to foreclose, as well as his failure to allege tender, supported the trial court's sustaining the demurrer without leave to amend. (See *Ochs v. PacifiCare of California* (2004) 115 Cal.App.4th 782, 794 [demurrer properly sustained to claims for declaratory and injunctive relief that were wholly derivative of failed allegations of statutory violations].)

D. The Trial Court Properly Exercised Its Discretion in Denying Leave to Amend.

Appellant maintains that, at a minimum, he should be granted leave to amend to allege causes of action for wrongful foreclosure and cancellation of instruments.[5] He

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[5] We summarily reject appellant's argument, made for the first time in his reply brief, that he should be permitted leave to amend to add allegations consistent with

bears the burden of showing that he could cure the defects in his complaint if granted leave to amend. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; *Arce v. Children's Hospital Los Angeles* (2012) 211 Cal.App.4th 1455, 1497, fn. 19.) "'To satisfy that burden on appeal, a plaintiff "must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading." [Citation.] The assertion of an abstract right to amend does not satisfy this burden.' [Citation.] The plaintiff must clearly and specifically state 'the legal basis for amendment, i.e., the elements of the cause of action,' as well as the 'factual allegations that sufficiently state all required elements of that cause of action.' [Citation.]" (*Maxton v. Western States Metals* (2012) 203 Cal.App.4th 81, 95.)

We have already explained the tender rule applies to any cause of action that is based on allegations of wrongful foreclosure. (E.g., *Abdallah v. United Savings Bank, supra,* 43 Cal.App.4th at p. 1109; *Karlsen v. American Sav. & Loan Assn., supra,* 15 Cal.App.3d at pp. 117–118.) Though appellant has offered to allege that he is not in default of his Loan, he has not offered to allege that he can tender the full amount due. Because the absence of any tender allegation would bar his claim, he has failed to show how an amendment would cure the defects in his complaint. (See *Newell v. State Farm General Ins. Co.* (2004) 118 Cal.App.4th 1094, 1100 [leave to amend should be denied where an amendment would be futile].) Moreover, we have found no merit to appellant's effort to demonstrate irregularities in the foreclosure process as a means of escaping the tender rule. Appellant's adding a wrongful foreclosure cause of action would not change the legal effect of his pleading.

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legislation that went into effect after the trustee's sale had been conducted. (See Legislative Counsel's Digest, Senate Bill No. 900 (2011-2012 Reg. Sess.), p. 93.) "In construing statutes, there is a presumption against retroactive application unless the Legislature plainly has directed otherwise by means of '"express language of retroactivity *or* . . . other sources [that] provide a clear and unavoidable implication that the Legislature intended retroactive application."' [Citations.]" (*Quarry v. Doe I* (2012) 53 Cal.4th 945, 955.) Appellant has pointed to nothing that suggests the Legislature intended Senate Bill No. 900 to be applied retroactively.

The proposed addition of a cause of action for cancellation of instruments fails for similar reasons: Appellant has failed to allege any valid basis to show that the documents prepared in connection with the foreclosure were void or voidable, and he has failed to show prejudice. (See Civ. Code, § 3412.) We are guided by the analysis in *Lam v. JP Morgan Chase Bank, N.A.* (E.D.Cal. 2012) 2012 WL 5827785 where the court dismissed a complaint premised on allegations challenging the authority of the defendants to foreclose in light of assignments and securitization. The court found that the plaintiff failed to state a claim, including one for cancellation of instruments. (*Id*. at *6.) More broadly, it addressed the plaintiff's request for leave to amend and, in a conclusion equally applicable to this matter, stated: "The court has considered Plaintiff's complaint and the legal theories that underlie this action and finds itself at a loss to see how further amendment of the complaint could possibly cure the shortcomings discussed above. Fundamentally, Plaintiff has strived mightily to build an action around a perfectly ordinary set of facts that admit of no significant irregularities and has understandably failed to derive from those facts any cognizable claims." (*Ibid*.)

DISPOSITION

The judgment is affirmed. Defendants are entitled to their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J. *

FERNS

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.